Supreme Court, U.S.
FILED

(1)

Number 942120 JUN 26 1995

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JODY C. CANNON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MITCHEL P. HOUSE, JR.
Georgia Bar No. 369100

Attorney for Petitioner

OF COUNSEL:

SELL & MELTON
1400 Charter Medical Building
P. O. Box 229
Macon, Georgia 31297-2899
(912) 746-8521

56 pp

Number _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JODY C. CANNON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MITCHEL P. HOUSE, JR.
Georgia Bar No. 369100

Attorney for Petitioner

OF COUNSEL:

SELL & MELTON
1400 Charter Medical Building
P. O. Box 229
Macon, Georgia 31297-2899
(912) 746-8521

QUESTIONS PRESENTED

1. Whether Petitioner's conspiracy conviction can stand when he was acquitted of all substantive counts, and no overt acts alleged in the indictment were proven at trial beyond a reasonable doubt?

2. Whether Petitioner's sentence may be enhanced 7 levels for the alleged dollar loss to the government pursuant to U.S.S.G. §2F1.1(b)(1)(H), without providing Petitioner with credit for the value of the goods furnished under the contract?

3. Whether Petitioner must be resentenced given the fact that one of two convictions was overturned as a matter of law, and the District Court considered the conduct underlying this conviction in fashioning Petitioner's sentence?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF CASE	4
REASONS FOR GRANTING THE WRIT	8
I. THE ELEVENTH CIRCUIT'S AFFIRMANCE OF CANNON'S CONSPIRACY CONVICTION CONFLICTS WITH 18 U.S.C. §371.	9
II. THE QUESTION OF THE APPLICABILITY OF A SET-OFF FOR VALUE PROVIDED AS CONTEMPLATED BY APPLICATION NOTE 7(a) OF U.S.S.G. §2F1.1(b)(1)(H) HAS NOT BEEN ADDRESSED BY FEDERAL COURTS. THIS IMPORTANT ISSUE SHOULD BE RESOLVED BY THE SUPREME COURT.	15

TABLE OF CONTENTS

Page

III. IN ANY EVENT, THE CASE MUST BE REMANDED FOR RESENTENCING. ... 18

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Arthur Pew Construction Co. v. Lipscomb, 965 F.2d 1559, 1576 (11th Cir. 1992) 14

Ingram v. United States, 360 U.S. 672, 3 L.Ed.2d 1503 (1959) 9, 14

United States v. Benz, 740 F.2d 903 (11th Cir. 1984) 9

United States v. Camejo, 929 F.2d 610 (11th Cir. 1991) 14

United States v. Cannon, 41 F.3d 1462, 1468 (1995) 1, 6, 8, 10, 11, 16-18

United States v. Catchings, 922 F.2d 777 (11th Cir. 1991) 14

United States v. Drougas, 748 F.2d 8, 15 (1st Cir. 1984) 14

United States v. Falcone, 311 U.S. 205, 85 L.Ed 128 (1940) 15

United States v. Frink, 912 F.2d 1413, 1415 (11th Cir. 1990) 14

United States v. Garcia-Pena, 743 F.2d 1462 (11th Cir. 1984) 9

United States v. Jackson, 700 F.2d 181, 185 (5th Cir. 1983) 14, 15

United States v. Schneider, 930 F.2d 555 (7th Cir. 1991) 17

United States v. Sorrow, 732 F.2d 176, 179 (11th Cir. 1984) 11

Williams v. United States, 503 U.S. 193, 112 S.Ct. 1112 (1992) 19

STATUTES

18 U.S.C. §371 ..... 2, 9, 11, 14

18 U.S.C. §1001 ..... 2, 4, 9, 10

18 U.S.C. §3231 ..... 3, 4

28 U.S.C. §1254(1) 2, 3

OTHER

U.S.S.G. §2B1.1 16

U.S.S.G. §2F1.1(b)(1)(H) ..... i, 8, 15-18

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JODY C. CANNON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Jody C. Cannon petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *United States v. Cannon*, 41 F.3d 1462 (11th Cir. 1995), and appears in Appendix A to this Petition. The Order on Petition for Rehearing and Suggestion of Rehearing En Banc appears in Appendix B to this Petition. The Judgment rendered by the District Court for the Middle District of Georgia, Macon Division, appears in Appendix C.

JURISDICTION

The Eleventh Circuit Court of Appeals' opinion was issued on January 6, 1995. On March 29, 1995, the Eleventh Circuit

issued its order denying Petitioner's Petition for Rehearing and Suggestion of Rehearing En Banc. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. §371

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for each misdemeanor.

18 U.S.C. §1001

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. §3231

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

28 U.S.C. §1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment of decree.

STATEMENT OF CASE[1]

Petitioner Jody C. Cannon, hereinafter "Cannon," was the sole defendant in a five count indictment. The superseding indictment, dated July 17, 1992, alleged one count of conspiracy and four substantive counts, charging that Cannon had knowingly and willfully made false statements and representations to the Department of Defense in violation of 18 U.S.C. §1001. (R1-11-1). Count I of the superseding indictment alleged that Cannon, aided and abetted by others, conspired to defraud the United States and to make and cause to be made false writings and documents in the performance of contracts for the manufacture of items for the United States Air Force, knowing that the documents and writings were false. (R1-11, 1-2). Count I alleged the following overt acts:

> A. Between September 30, 1986, and continuing up to and including June 30, 1990, the Defendant, Jody Cannon, an employee of Space Age Manufacturing, Warner Robins, Georgia, aided and abetted by others, while producing and manufacturing Outboard Link Condition Control Transfers, also called Engine Condition Levers, for the United States, C-130 Transport Plane, pursuant to contracts with the United States of America, did cause to be produced and manufactured a quantity of Outboard Link Condition Control Transfers that did not meet the contract specifications and requirements, in that the said Outboard Link Condition Control Transfers were not constructed

---

[1]Jurisdiction in the United States District Court for the Middle District of Georgia was invoked pursuant to 18 U.S.C. §3231.

in accordance with Military Standard 27643 as specified in the contracts.

B. Between September 30, 1986, and continuing up to and including June 30, 1990, the Defendant, Jody Cannon, aided and abetted by others, presented and caused to be presented to government inspectors DD Form 250s, which were necessary for Space Age Manufacturing to receive payment for performance of the contracts and which caused the United States Air Force to pay Space Age Manufacturing for such performance, knowing that he and others had not complied with the specifications of the contracts with the United States of America as represented.

C. Between February 1, 1989, and continuing up to and including June 30, 1990, the Defendant, Jody Cannon, aided and abetted by others, while producing and manufacturing armor plating for United States helicopters pursuant to contracts with the United States of America, did cause titanium that did not meet the contract specifications and requirements to be used in place of that titanium specified in the contracts.

D. Between February 1, 1989, and continuing up to and including June 30, 1990, the Defendant, Jody Cannon, aided and abetted by others, presented and caused to be presented to the government inspectors DD Form 250s, which were necessary for Space Age Manufacturing to receive payment for performance of the above contracts, and which caused the United States Air Force to pay Space Age Manufacturing for such performance, knowing that he and others had not complied with the

> specifications of the contracts with the United States of America as further specified in Counts 2, 3, 4 and 5.

(R1-11-1). Count V alleged that Petitioner, aided and abetted by others, had made and caused to be made false writings and documents by using and causing to be used a form DD 250 which certified that contract specifications for Contract No. F09603-89-G-0051-0063 had been fully performed, when in truth such contract specifications had not been performed as required by the contract. (R1-11, 6-7).

The DD Form 250 is a document which is presented to a government inspector known as a "quality assurance representative" (QAR). It is the duty of the QAR to come to the manufacturing site, to perform tests and measurements, and to review documentation before accepting a product on behalf of the government. Nowhere on the DD Form 250 is there a certification or a space for such certification by the contractor that the contract specifications have been fully performed. (*Cannon*, 41 F.3d at 1468). This document, which is completed by the government QAR, merely contains a certification by the QAR that he has inspected the items before accepting them. (R1-48 - Exhibit "A"). The government did not produce any DD Form 250s filled out by Cannon at trial, nor was it Cannon's duty to fill out or prepare these documents.

At Space Age, Cannon worked in the office as general manager; his duties included bidding for contracts and purchasing supplies for the performance of these contracts. The production of parts as well as the inspection of parts was a separate component of the business at Space Age in which Cannon did not participate. (R3-17, 14-22).

The Government contended with regard to all four substantive counts, all of which concerned titanium armor plate,

that Cannon, by way of a "false" DD Form 250, had certified that the armor plate delivered was manufactured with MIL-T-46077 ballistically tested titanium when instead, it was manufactured with non-ballistically tested, "generic" 9046 or 6AL4V titanium.

Testimony submitted by way of proffer (R6-60-67) from Government employee Tom Yentzer, showed that the Government considered the non-ballistically tested titanium and ballistically tested titanium to be equivalent, and that the Government allowed substitution of the non-ballistically tested titanium for use as armor plate on helicopters. (R6-59, 63-67). In addition, Cannon submitted a proffer of testimony from John W. Bush, a Government Materials Metallurgical Engineer. (R6-67-72). This testimony would have shown that the same type of non-ballistically tested titanium supplied by Space Age was essentially the equivalent of ballistically tested titanium, that it was acceptable as a substitute material for the "intended use," and that this titanium was indeed allowed to be substituted. (R6-67-72). Cannon also proffered the testimony of Ronald Boulet, Branch Chief in the Armament Directorate of Wright Laboratory at Elgin Air Force Base, who would have testified that an actual piece of the titanium at issue in Count V that was seized from Space Age and bore the job number of the contract at issue (R6-48-50 testimony of FBI Agent Fred Stofer) was subjected to ballistic testing and passed. (R6-28-42). Boulet would have testified that this titanium was the equivalent of ballistically tested titanium. (R6-28-42).

On August 18, 1992, Cannon was convicted of Count I, the conspiracy count, and substantive Count V, but acquitted of substantive Counts II, III and IV of the indictment. Cannon's Motion for a New Trial and Judgment of Acquittal were denied on January 29, 1993.

Cannon was sentenced on March 24, 1993. Among other rulings, the sentencing court enhanced Cannon's sentence by 7

levels pursuant to U.S.S.G. §2F1.1(b)(1)(H) for a dollar loss to the government of $125,257.00. In calculating the amount of loss, the court simply added together the value of the 1986 link assembly contract mentioned in Count I - the conspiracy count - and the titanium armor plate contract charged in Count V. (R9-6). Cannon was sentenced to 30 months incarceration on each count of conviction, to run concurrently.

On appeal to the Eleventh Circuit Court of Appeals, the court held that the evidence was insufficient as a matter of law to convict Cannon of substantive Count V. *United States v. Cannon*, 41 F.3d 1462, 1468 (11th Cir. 1995). The court reasoned that the Government had failed to prove that the DD 250 forms were false. *Id.* The court noted that the DD 250 forms do not certify that the parts supplied conformed to the contract. *Id.* Rather, the QAR signs the form signifying acceptance and conformance of the goods. *Id.* At trial, the QAR testified that he would not have signed the DD 250 unless he had been presented with a document certifying that the titanium had been ballistically tested. *Id.* at 1468-69. However, the only certification form contained in the file for the contract charged in Count V was for non-ballistically tested titanium. *Id.* at 1469. The Eleventh Circuit concluded that the DD 250 contained no representations from Cannon or his employer concerning compliance with government specifications. *Id.* at 1468. Furthermore, there was no evidence that false representations had been made to the QAR before the QAR signed the DD 250 form. *Id.* The Eleventh Circuit reversed Petitioner's conviction on substantive Count V. However, Cannon's conspiracy conviction and his sentence were permitted to stand. *Id.* at 1469.

Petitioner's Petition for Rehearing and Suggestion of Rehearing En Banc were denied by an Order dated March 29, 1995.

REASONS FOR GRANTING THE WRIT

I.

THE ELEVENTH CIRCUIT'S AFFIRMANCE OF CANNON'S CONSPIRACY CONVICTION CONFLICTS WITH 18 U.S.C. §371.

This case presents a unique situation. Cannon was acquitted of every substantive count of the indictment, yet was convicted of conspiracy. Because of the conspiracy conviction, he received the same sentence as he would have received had his conviction on the substantive count which was reversed been permitted to stand.

Pursuant to 18 U.S.C. §371, the Government must prove the following critical elements of a prima facie case of conspiracy:

1. Two or more persons conspired together;

2. There was an agreement to commit the offense (*Ingram v. United States*, 360 U.S. 672, 3 L.Ed.2d 1503 (1959)); and

3. Accomplishment of one or more overt acts to effect the object of the conspiracy. *See generally, United States v. Garcia-Pena*, 743 F.2d 1462 (11th Cir. 1984); *United States v. Benz*, 740 F.2d 903 (11th Cir. 1984). As shown below, the Government failed to introduce adequate proof of an overt act to effect an object of the conspiracy pursuant to 18 U.S.C. §1001. Furthermore, the Government failed to provide sufficient evidence concerning an agreement to commit an offense.

The Eleventh Circuit upheld Cannon's conspiracy conviction, reasoning as follows:

> The Government identified Cannon's unindicted co-conspirators as Space Age Manufacturing, Inc., and Space Age's President, Jack C. Kerstetter. Cannon placed bids, signed the contracts at issue, and knowingly purchased non-conforming titanium. Cannon and Kerstetter discussed that ordering conforming titanium would cause Space Age to lose money. While Cannon argued that he purchased the titanium because Kerstetter "ordered" him to do it, this does not absolve his actions. Cannon, Space Age and Kerstetter gave the USAF titanium with less pecuniary value than the titanium it contracted for, and with less performance value than the titanium it contracted for.

Cannon, 41 F.3d at 1468.

The Eleventh Circuit reversed Cannon's conviction on Count V, in which the Government charged that Cannon had violated 18 U.S.C. §1001 because he had "used and caused to be used" a false Form DD 250. The court held that as a matter of law, the Government failed to prove that the DD 250 forms were false. Moreover, the court noted that, "Nowhere on the DD 250 does Cannon or anyone at Space Age certify that the parts supplied conformed to the contract. Rather, the Government QAR signs the form signifying acceptance and conformance of the goods." *Id.* at 1468. The court further noted that the only evidence presented by the Government to show that the QAR had signed the DD 250 forms because of false representations was the QAR's testimony that he would not have signed the DD 250 unless he had been presented with a document certifying the titanium as ballistically tested. *Id.* at 1468-69. However, when the Government seized the file for the contract charged in Count V, the only certification form it contained showed no signs of

tampering and was for non-ballistically tested titanium. (R3-61-62, *Id.* at 1469). The court concluded:

> Although the titanium did not conform, the documents did not lie. It was through the failure of the QAR to perform an adequate review that the non-conforming material was certified.

Id.

As evidenced by the Eleventh Circuit's reversal of substantive Count V, the Government did not prove the existence of any false statements.

The only overt act mentioned in the Eleventh Circuit's opinion, act C, dealt with the contract that was the subject of Count V. However, the panel reversed Cannon's conviction on Count V because there were no false statements made to the Government. In order for a conspiracy conviction under 18 U.S.C. §371 to stand, the Government must prove each element of its case beyond a reasonable doubt. One element is the accomplishment of one or more overt acts to effect the object of the conspiracy. *See United States v. Sorrow*, 732 F.2d 176, 179 (11th Cir. 1984). The only overt act mentioned by the Eleventh Circuit's opinion was Cannon's purchase of non-conforming titanium. However, as the court later held in its reversal of substantive Count V, neither Cannon nor the unindicted co-conspirators ever represented to the Government that the titanium was anything other than what it was.

Overt act C charged that Petitioner "did cause titanium that did not meet the contract specifications and requirements to be used in place of that titanium specified in the contracts." The conduct charged in Overt act C is not necessarily criminal conduct. In order for the jury to conclude that Cannon had conspired to defraud the government and had committed Overt

Act C in furtherance of the conspiracy, the jury would have to conclude that Cannon **intended** to provide the government titanium with less value than that for which the government had contracted. The district court excluded the proffered testimony of Tom Yencer, which would have demonstrated that the government considered non-ballistically tested titanium and ballistically tested titanium to be equivalent, and that the government allowed substitution of non-ballistically tested titanium for use as armor plate on helicopters. (R6-59, 63-67). The court also excluded the testimony of John W. Bush, a government materials metallurgical engineer, which would have shown that the same type of non-ballistically tested titanium supplied by Space Age was essentially the equivalent of ballistically tested titanium, that it was acceptable as a substitute material for the "intended use," and that this titanium was indeed allowed to be substituted. (R6-67-72). The court also excluded the testimony of Ronald Boulet, Branch Chief in the Armament Directorate of Wright Laboratory at Elgin Air Force Base, who would have testified that an actual piece of the titanium at issue in Count V, that had been seized from Space Age and that bore the job number of the contract at issue (R6-48-50, testimony of FBI agent Fred Stofer) was subjected to ballistic testing and passed. (R6-28-42). Boulet would have testified that this titanium was the equivalent of ballistically tested titanium. (R6-28-42).

Had the jury been permitted to consider testimony that the titanium supplied was equivalent to the titanium specified in the contract, the jury could have concluded that Petitioner did not intend to provide the government with titanium that was less valuable than that for which it had contracted. This testimony was especially important given the fact that, as the Eleventh Circuit concluded, there were no false statements made. Because Cannon did not have the opportunity to prove that he did not have the intent to defraud the government when he ordered the

titanium at issue in Overt act C, Overt act C may not provide the basis for affirmance of Petitioner's conspiracy conviction.

Furthermore, the evidence at trial showed that after Cannon had ordered the non-conforming titanium, he quit his job. He had no role in the manufacture of the armor plates that were the subject of Count V, nor did he have any role in the certification process. Although Cannon did order non-conforming titanium, he did not "cause titanium that did not meet the contract specifications and requirements to be used in place of that titanium specified in the contracts," as the indictment alleged. After ordering the non-conforming titanium, Cannon resigned from his job and had no further role in the Government contracts. (R3-57-59).

The Eleventh Circuit's opinion makes no mention of the other three overt acts charged in the indictment. None of these acts could have formed the basis for a conspiracy conviction, because the Government proved none of them beyond a reasonable doubt.

Overt act A dealt with a 1986 contract for the manufacture of Outboard Link Condition Control Transfers, which was not covered by a separate count of the indictment. The Government alleged that the contract did not comply with Military Standard 27643, "as specified in the contracts." (R1-11-2). However, the requirement that the link assemblies comply with Military Standard 27643 is not specified in the 1986 contract. (R1-73-3). Overt act B alleges that Cannon and others presented false DD Form 250s to the Government. As the Eleventh Circuit held, the Government failed to prove the existence of any false DD Form 250s. Overt act D deals with a 1989 link assembly contract, which the Government admitted had been performed in full conformity with the contract's specifications, including Military Standard 27643, which was specifically included in the 1989 but not the 1986 contract. (R1-73-4).

The Government's evidence concerning an agreement to commit an offense was also insufficient to sustain a conviction pursuant to 18 U.S.C. §371. There are long-standing principles and traditions concerning the sufficiency of proof of the parties' agreement to conspire. *Ingram v. United States*, 360 U.S. 672, 3 L.Ed.2d 1503 (1959). Thus, the Government had to show beyond a reasonable doubt that Cannon had the **deliberate, knowing and specific intent to join the conspiracy**. *United States v. Jackson*, 700 F.2d 181, 185 (5th Cir. 1983). While the Government was not required to prove that Cannon had knowledge of all details, phases or aspects of the conspiracy, the Government was required to show that Cannon knew the essential nature of the agreement. *United States v. Frink*, 912 F.2d 1413, 1415 (11th Cir. 1990). Thus, mere presence or mere association was an insufficient basis from which a jury could infer intent or knowing participation in an unlawful enterprise or agreement to conspire. *United States v. Camejo*, 929 F.2d 610 (11th Cir. 1991); *United States v. Catchings*, 922 F.2d 777, 781 (11th Cir. 1991); *United States v. Jackson*, 700 F.2d 181, 185 (5th Cir. 1983).

Furthermore, the concept of agreement and intent to agree are intertwined, so that two types of intent must be proven by the government: the intent to agree and the intent to commit the substantive offense. *United States v. Drougas*, 748 F.2d 8, 15 (1st Cir. 1984); *Arthur Pew Construction Co. v. Lipscomb*, 965 F.2d 1559, 1576 (11th Cir. 1992). Courts will not lightly infer a defendant's knowledge and acquiescence in a conspiracy. *United States v. Jackson*, 700 F.2d 181, 185 (5th Cir. 1983). Therefore, a showing that Cannon merely associated with those participating in a conspiracy was insufficient evidence. *United States v. Jackson*, *Id.* The Fifth Circuit Court of Appeals stated the concept clearly:

> . . . the government cannot prove a conspiracy by presenting evidence that only places the defendant in "a climate of activity that reeks of something foul."

Jackson, 700 F.2d at 185.

Finally, *United States v. Falcone*, 311 U.S. 205, 85 L.Ed 128 (1940), addresses the essential nature of the agreement to conspire as follows:

> . . . one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy, even though his sale may have furthered the object of the conspiracy to which the distiller was a party, but of which the supplier had no knowledge.

Id. at 210-211.

The Government's evidence was insufficient to prove all elements of the offense of conspiracy beyond a reasonable doubt. Reversal is required.

II.

THE QUESTION OF THE APPLICABILITY OF A SET-OFF FOR VALUE PROVIDED AS CONTEMPLATED BY APPLICATION NOTE 7(a) OF U.S.S.G. §2F1.1(b)(1)(H) HAS NOT BEEN ADDRESSED BY FEDERAL COURTS. THIS IMPORTANT ISSUE SHOULD BE RESOLVED BY THE SUPREME COURT.

The district court enhanced Cannon's base offense level by seven levels pursuant to §2F1.1(b)(1)(H) for a dollar loss to the Government of $125,257.00. In calculating the amount of loss, the court simply added together the value of the 1986 Link Assembly Contract mentioned in Count I - the conspiracy count - and the Titanium Armor Plate Contract charged in Count V. (R9-6). On appeal, the Eleventh Circuit affirmed this finding. The Eleventh Circuit noted that §2F1.1 Application Note 7 of the United States Sentencing Commission Guidelines Manual

provides that "frequently, loss in a fraud case will be the same as in a theft case." *Cannon*, 41 F.3d at 1466. The court also noted that under U.S.S.G. §2B1.1, "where the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim." *Id.* However, the district court's decision to use the contract value without regard to the value that the Government received under the contract was clearly erroneous.[2] The only way that the sentencing court's method of calculation could have been proper is that if upon acceptance and payment but before using any of the parts, the Government became aware of any problems with the parts and disposed of the entire lot thereby receiving no benefit from them.

Application Note 7 (a) to U.S.S.G. §2F1.1, provides that when the value of an item that does have some value is misrepresented, the loss is the difference between the amount paid and the product's value. The Guidelines provide:

> (a) Fraud involving misrepresentation of the value of an item or product substitution. A fraud may involve a misrepresentation of the value of an item that does have some value (in contrast to an item that is worthless). Where, for example, a defendant fraudulently represents that stock is worth $40,000.00 and the stock is worth only $10,000.00, the loss is the amount by which the stock was over-valued (i.e. $30,000.00). In a case involving a misrepresentation concerning the quality

---

[2] In its findings, the sentencing court stated, "the amount of the loss is at least what the contract value was, $125,257.00. If I were to try to give credit for the parts that have not yet failed or that the Government is still using, it would be pure and rank speculation, and the Court cannot engage in speculation." (R9-6).

> involving a misrepresentation concerning the quality of a consumer product, the loss is the difference between the amount paid by the victim for the product and the amount for which the victim could resell the product received.

Pursuant to Application Note 7 (a) to U.S.S.G. §2F1.1, Cannon is entitled to a set-off or credit for the value of the items supplied by Space Age and used by the Government. *See United States v. Schneider*, 930 F.2d 555 (7th Cir. 1991).

The Government failed to prove that either the titanium plates or the link assemblies did not perform up to standard. In 1992, Cannon himself advised the Government of possible discrepancies in the 1986 Link Assembly Contract. By then, six years had passed, and there had been an intervening 1989 contract reordering link assemblies. The testimony at trial (R6-82, 83), showed that there were no reported failures of link assemblies in the six year period. Furthermore, the evidence at sentencing showed that in light of the six year time period, with an intervening contract to resupply link assemblies along with the rate at which link assemblies were changed out and discarded, there were likely no link assemblies from the 1986 contract remaining in service. (R8-47, 42-48). Therefore, the Government had gotten the full use and service out of the product supplied and had incurred no loss at all. (R8-42-48).

The sentencing court also considered the cost of the titanium armor plate which was the subject matter of Count V of the indictment. Cannon was acquitted of Count V as a matter of law; this contract could not be used as a basis for enhancement. The Eleventh Circuit tacitly recognized this fact when it stated, "the sentencing court could properly consider the conduct charged in **Counts II-IV** as well [as to more than minimal planning], so long as the government proved them by the greater weight of the evidence." *Cannon*, 41 F.3d at 1467 (emphasis added).

Moreover, the testimony showed that the armor plate was used by the Government for its intended purpose. Defendant's proffered testimony showed that the Government now allows substitution of the type of titanium used in production of the titanium armor plate which was the subject of Count V. (R6-57, 63-72). Furthermore, Defendant's proffered testimony showed that the very titanium used in the Count V contract was subsequently ballistically tested and passed. (R6-48-50, R6-28-42).

In this case, replacement was not at issue because the Government did not replace the armor plate, and in fact now uses the same type of titanium provided by Space Age as an essential equivalent of the ballistically tested titanium. Therefore, the use of the face amount of the contracts, without providing a set-off for the value of the products supplied, was an improper method of calculation.

The Government has not cited, and Petitioner has not found, a case in this Court or any circuit addressing the applicability of a set-off for value provided as contemplated by Application Note 7 (a) of U.S.S.G. §2F1.1(b)(1)(H). This is a sentencing issue of first impression, but one that is likely to recur. Therefore, this Court's consideration of this important question is appropriate.

III.

IN ANY EVENT, THE CASE MUST BE REMANDED FOR RESENTENCING.

Although the Eleventh Circuit reversed Cannon's conviction on Count V, the court permitted Cannon's sentence to stand, presumably because the district court had imposed concurrent sentences on Count I and Count V. *Cannon*, 41 F.3d at 1469. This was error. At sentencing, the district court calculated the amount of loss by adding together the value of the

1986 contract mentioned in Count I, and the titanium armor plate contract charged in Count V. (R9-6). Because Cannon was acquitted on Count V as a matter of law, the contract which was the subject of Count V could not be used to enhance his sentence. According to paragraph 18 of the Presentence Report, the Government contracts totaled $115,000.00 for the link assembly contract, plus $10,257.00 for the Count V titanium contract. If $10,257.00 is subtracted from the $125,000.00 figure, this results in a one offense level decrease. Had Cannon's offense level been 18 rather than 19, his sentencing range would have been 27 to 33 months, rather than 30 to 37 months. Although Cannon's 30 month sentence is within the range of sentences permitted for offense level 18, resentencing is necessary because of the likelihood that the sentencing error affected the length of his sentence. *See Williams v. United States*, 503 U.S. 193, 112 S.Ct. 1112 (1992).

Furthermore, the sentencing court's "Statement of Reasons" at page 5 of the district court's Judgment (Appendix C) is erroneous in that it states:

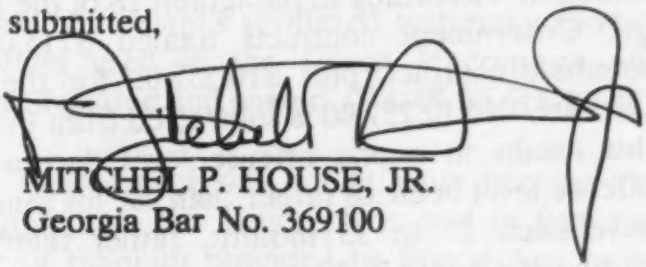
> The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

Of course, Cannon was sentenced to 30 months imprisonment. This discrepancy should be resolved on resentencing. Resentencing would also permit the district court to review other aspects of Cannon's sentence in light of the Eleventh Circuit's other findings.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that his Petition for Writ of Certiorari be granted.

Respectfully submitted,



MITCHEL P. HOUSE, JR.
Georgia Bar No. 369100

Attorney for Petitioner

SELL & MELTON
P. O. Box 229
Macon, Georgia 31297-2899
(912) 746-8521

U.S. v. CANNON

UNITED STATES of America, Plaintiff-Appellee

v.

Jody CANNON, Defendant-Appellant.

No. 93-8498.

United States Court of Appeals, Eleventh Circuit

Jan. 6, 1995.

Former general manager of government contractor was convicted in the United States District Court for the Middle District of Georgia, No. CR92-41-MAC-DF, Duross Fitzpatrick, J., 811 F.Supp. 1568, of conspiracy to defraud the United States government, and of defrauding government by using false documents, and he appealed. The Court of appeals, Fay, Senior Circuit Judge, held that: (1) trial court was within its discretion in excluding evidence of government's metallurgical and ballistics testing; (2) defendant's offense level was properly computed at sentencing; (3) evidence supported conspiracy conviction; (4) conviction for using false documents to elicit payment on government contracts was not supported by evidence; and (5) prosecutor's comments in closing argument were not improper or prejudicial.

Affirmed in part, and reversed in part.

1. **Criminal Law 1153(1)**

On appeal from criminal conviction, reviewing court will not disturb trial judge's decision to admit or exclude evidence absent clear showing of abuse of discretion.

2. **Criminal Law 1139**

On appeal from criminal conviction, sufficiency of evidence, a question of law, is subjected to de novo review.

3. **Criminal Law 1144.13(3)**

In reviewing sufficiency of evidence to support conviction, Court of Appeals views evidence in light most favorable to government, including all reasonable inferences and credibility judgments.

4. **Criminal Law 1159.2(7)**

In reviewing sufficiency of evidence to support conviction, Court of Appeals asks whether reasonable trier of fact, when choosing between reasonable constructions of evidence, could have found defendant guilty beyond reasonable doubt.

5. **Criminal Law 713**

Prosecutorial conduct requires new trial only if remarks were improper and prejudiced defendant's substantive rights.

6. **Criminal Law 1171.1(2.1)**

In determining whether prosecutor's remarks require new trial, appeals court reviews them in context and assesses probable jury impact.

7. **Indictment and Information 60**

Sufficiency of indictment is reviewed on appeal for whether it contains every element of offense charged and adequately informs accused of charge being lodged.

8. Criminal Law 1139, 1158(1)

Court of Appeals does not disturb sentencing court's fact-findings absent clear error, but reviews de novo sentencing court's application of sentencing guidelines to those facts.

9. Criminal Law 1313(1)

Sentencing court may consider defendant's conduct not covered by counts of conviction if government proves their existence by greater weight of evidence.

10. Criminal Law 1044.1(7)

Defense motion for judgment of acquittal on seventh day after jury discharge was sufficient to preserve for appeal counts on which defendant was convicted. Fed.Rules.Cr.Proc.Rule 29(c), 18 U.S.C.A.

11. Criminal Law 388.3

Evidence that titanium seized from government contractor passed government's ballistics testing did not negate intent to defraud, and thus could be excluded int rial of contractor's employee for conspiracy to defraud United States government and for defrauding government with false documents, based on allegations that defendant supplied and sought payment for nonballistically tested titanium when contract required ballistically tested titanium; that titanium passed ballistics test did not excuse deceit in supplying nonballistically tested titanium as required by contract. 18 U.S.C.A. §§371, 1001.

12. Conspiracy 45

Evidence of government-condoned substitutions in later government contracts with other, unrelated parties does not affect government's showing of intent to defraud, for purposes of

prosecution of government contractor for conspiracy to defraud the United States government. 18 U.S.C.A. §§371, 1001.

13. Conspiracy 51
Fraud 69(1)

In sentencing employee of government contractor for conspiracy to defraud United States government and for defrauding government with false documents, sentencing court did not clearly err in finding government's monetary loss to be contract value, and in increasing employee's offense level accordingly. 18 U.S.C.A. §§371, 1001; U.S.S.G. §§2F1.1, 2F1.1, comment. (n.7), 18 U.S.C.A.App.

14. Conspiracy 51

In sentencing employee of government contractor for conspiracy to defraud United States government with false documents, sentencing court could properly consider conduct charged in counts of which defendant was acquitted, and increase defendant's offense level accordingly for more than minimal planning, where acts charged in conspiracy count involved numerous contracts spanning four-and-half year period, and government witness testified that defendant told her he altered certification forms from other contracts to conceal substitution of nonconforming material. 18 U.S.C.A. §371; U.S.S.G. §§1B1.1, comment. (n.1), 2F1.1(b)(2)(1), 18 U.S.C.A.A.App.

15. Criminal Law 1254

In being sentenced for conspiring to defraud United States government with false documents, employee of government contractor was subject to increased offense level for conscious or reckless risk of serious bodily injury, even if any injury had yet to occur, where employee ordered nonballistically tested titanium, contrary to contract specifications, to make armor plating on military helicopters, and government witness testified that

employee told her inferior bearings had been substituted on propeller parts and that inferior bearings would crack under pressure. 18 U.S.C.A. §371.

16. Conspiracy 47(6)

Evidence that government contractor's general manager placed bids, signed contracts, and knowingly purchased nonconforming titanium for use in military helicopters, and that manager and contractor's president discussed that ordering conforming titanium would cause contractor to lose money, supported manager's conviction for conspiring to defraud United States government, even if contractor's present "ordered" manager to purchase nonconforming titanium; manager, and contractor as president as unindicted coconspirators, gave government titanium with less pecuniary value than product contracted for, and with less performance value. 18 U.S.C.A. §371.

17. Fraud 58(2)

Although government contractor's general manager knew that government contract to supply ballistically tested titanium was not performed to specifications, manager's conviction for using false documents to defraud government was not supported by evidence that manager submitted "DD 250" forms requesting payment on contract, which government quality assurance representative (QAR) signed, certifying that contractor met contract specifications and deserved payment; manager did not certify on DD 250 that parts supplied were conforming, and, although QAR testified that he would not have signed DD 250 absent certification of conformity, only certification form in contract file showed no signs of tampering and was for nonballistically tested titanium. 18 U.S.C.A. §1001.

18. Criminal Law 720(7.1)

In prosecution of government contractor's general manager

for conspiring to defraud United States government, based on evidence that manager knowingly supplied nonballistically tested titanium for use in military helicopters when government contract called for ballistics testing, prosecutor did not act improperly in closing argument by remarking that even if titanium could pass ballistic test, "the only way you're going to know that is if you get shot at"; prosecutor's statement was correct, since after-the-fact testing could not cure initial failure to supply tested titanium. 18 U.S.C.A. §371.

Appeal from the United States District Court for the Middle District of Georgia.

Before COX, Circuit Judge, and FAY, Senior Circuit Judge, and NELSON*, District Judge.

FAY, Senior Circuit Judge:

This appeal arises from Cannon's two-count conviction for conspiring to defraud the United States government and for defrauding the government by using false documents. The jury acquitted Cannon on three other counts. The indicted activity involves improperly performed defense contracts for the United States Air Force ("USAF").

Cannon alleges many errors in the trial and at sentencing. First, Cannon alleges the trial judge abused his discretion by excluding evidence of metallurgical and ballistics testing by the government, in conjunction with this prosecution, long after the contracts had been performed. Cannon also alleges the trial judge abused his discretion in excluding evidence that the government accepted nonballistically tested titanium as

---

*Honorable Edwin L. Nelson, U. S. District Judge for the Northern District of Alabama, sitting by designation.

conforming in later contracts with other parties that called for ballistically tested titanium. As to each of Cannon's allegations, we disagree.

Cannon alleges the evidence cannot support the conspiracy conviction on Count I under 18 U.S.C. §371. We disagree, and AFFIRM the conviction.

Cannon alleges the evidence cannot support the conviction on Count V for using false documents to defraud the government under 18 U.S.C. §1001. We agree, REVERSE the judgment, and REMAND with instructions to enter a not guilty judgment as a matter of law on Count V.

Cannon alleges the trial judge reversibly erred in admitting video-tape of a C-130 airplane and its connecting link presented at trial with live narration. We disagree.

Cannon alleges prosecutorial misconduct, spanning the grand jury proceeding through closing argument, requires a new trial. We disagree.

Cannon alleges the indictment failed to charge and the evidence cannot support a conviction on the theory of aiding and abetting. In light of our finding that the evidence does not prove the DD 250 forms submitted to the government were false, we do not reach the issue of whether Cannon would be guilty of aiding and abetting had they been false.

Cannon alleges the trial judge wrongly computed his offense level at sentencing, wrongly used the full contract price as the amount of government loss, and wrongly found more than minimal planning, conscious or reckless risk of serious bodily injury, and an aggravating role as an organizer, leader, manager or supervisor by Cannon. We disagree.

I. BACKGROUND

Jody Cannon was General Manager at Space Age Manufacturing, Inc. ("Space Age"), in Warner Robins, Georgia, for approximately twenty years. He was General Manager when the indicted activity occurred.

Space Age contracted with the United States Air Force to supply parts for military aircraft. Count I of the superseding indictment charges Mr. Cannon with conspiring to defraud the government and to use false documents to elicit payment on government contracts that Cannon knew Space Age had not performed to military specifications. The jury convicted Mr. Cannon of this count (Count I). The superseding indictment also charged, among other violations, a substantive count (Count V) of using false documents to elicit payment on contracts Cannon knew were not performed to military specifications. The jury convicted Mr. Cannon on this substantive count and acquitted him on all other counts.

Both Counts I and V involved defense contracts between Space Age and the USAF. Count I, the conspiracy count, involved two types of parts the prosecution alleged did not conform: First, a throttle link assembly, which is used to feather a propeller on a C-130 aircraft.[1] Second, titanium armor plating for H-53 helicopters which the contract required to be ballistically tested--that is, to have defied penetration when shot with bullets. Space Age knowingly supplied nonballistically tested titanium.

The indictment charges that Cannon, as General Manager, submitted bids for government contracts and placed orders for goods to fill those contracts. Cannon admits ordering the

---

[1]Feathering a propeller turns the propeller blades directly into the wind. Feathering alleviates wind drag because the wind blows through the blades instead of spinning them.

nonconforming titanium charged in Counts I and V in March of 1990. (R3-59; Appellant's Br. at 5). After using materials that did not conform to contract specifications, Space Age submitted DD 250 forms to the government Quality Assurance Representative ("QAR") for payment. The QAR reviews other documents when receiving the DD 250 and signs the DD 250, certifying that the contractor has met contract specifications and deserves payment. The government argues that by presenting the DD 250 to the QAR, Cannon "took affirmative actions to cause the QAR to accept the items, and to certify that they met the contract specifications, thereby causing the false documents to be made." (Appellee's Br. at 26). The substantive count depends on whether this government argument is correct as a matter of law.

II. STANDARD OF REVIEW

This appeal requires review of findings of fact, conclusions of law, and discretionary rulings on whether to admit or exclude evidence.

[1] We will not disturb the trial judge's decision to admit or exclude evidence absent a clear showing of abuse of discretion. *United States v. Russell*, 703 F.2d 1243, 1249 (11th Cir. 1983).

[2-4] We subject sufficiency of the evidence, a question of law, to *de novo* review. *United States v. Kelly*, 888 F.2d 732, 739 (11th Cir. 1989). We view the evidence in the light most favorable to the government, including all reasonable inferences and credibility judgments. *See Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942). We ask whether a reasonable trier of fact, when choosing among reasonable constructions of the evidence, could have found the defendant guilty beyond a reasonable doubt. *Kelly*, 888 F.2d at 740.

[5, 6] Prosecutorial conduct requires a new trial only if we find the remarks (1) were improper and (2) prejudiced Cannon's

substantive rights. *United States v. Cole*, 755 F.2d 748, 767 (11th Cir. 1985). We review them in context and assess the probable jury impact. *United States v. Stefan*, 784 F.2d 1093, 1100 (11th Cir. 1986).

[7] We review the indictment's sufficiency for whether it contains every element of the offense charged and adequately informs the accused of the charge being lodged. *Stefan*, 784 F.2d 1093, 1101-02 (11th Cir. 1986).

[8] We do not disturb the sentencing court's fact findings absent clear error. *United States v. Davis*, 902 F.2d 860, 861 (11th Cir. 1990). Nonetheless, we review *de novo* the sentencing court's Federal Sentencing Guidelines application to those facts. *United States v. Rodriquez*, 959 F.2d 193 (11th Cir. 1992), *cert. denied*. ____ U.S. ____, 113 S.Ct. 649, 121 L.Ed.2d 563 (1992).

[9] The sentencing court may consider defendant's conduct not covered by counts of conviction if the government proves their existence by the greater weight of the evidence. *See United States v. Alston*, 895 F.2d 1362, 1372-73 (11th Cir. 1990).

III. ANALYSIS

A. Procedure

[10] This Court at oral argument questioned whether Cannon had waived appeal on Counts I and V by failing to move for a judgment of acquittal on each of these counts. He did not. Cannon moved for judgment of acquittal on August 27, 1993, the seventh day after jury discharge. This motion is proper under Fed.R.Crim.P. 29(c) and preserved the issues for appeal.

B. Evidentiary Rulings

[11] We find the trial judge did not abuse his discretion

by excluding evidence of metallurgical[2] and ballistics testing by the government. The record indicates the government, in connection with Cannon's prosecution, seized titanium from Space Age in January of 1991. This titanium passed government ballistics tests. Cannon argues that because the titanium passed the ballistics test, it negates a finding of his intent to defraud the government. We disagree.

[12] First, Cannon did not show the titanium seized in the search came from the batch used to perform the contract implicated in Count V. Indeed, the government witness, a Space Age supplier, testified that she had no way of knowing whence the titanium came, who bought it, who sold it, when or in connection with what contract it was sold. (R3-129-30). Second, even if Cannon had traced this titanium to the contract in Count V, it would not matter. That the nonballistically tested titanium supplied by Space Age later passed ballistics tests does not pardon the deceit of having supplied nonconforming, nonballistically tested titanium in a contract requiring ballistically tested titanium. In short, titanium that *could* pass the ballistics test is not equal to titanium that *has* passed the ballistics test. The government contracted and paid for the latter; Space Age's substitution of the former, without government consent, does not negate the government's showing of intent to defraud. The trial judge did not abuse his discretion in excluding evidence of these after-the-fact, government-conducted tests. Likewise, evidence of government condoned substitutions in later contracts with other, unrelated parties does not affect the government's showing of intent to defraud.

Further, we find the trial judge did not abuse his discretion in admitting the C-130 aircraft videotape with live narration.

---

[2]Metallurgical tests analyze metals and their properties in bulk and at the atomic level. *See The American Heritage Dictionary of the English Language*, 824 (New College Ed.1976).

C. Findings of Fact

[13] Upon review of the sentencing court's fact findings, we find no clear error. The sentencing court found the government's monetary loss to be the contract value. The United States Sentencing Commission Guidelines Manual, §2F1.1 Application Note 7, states that "[f]requently, loss in a fraud case will be the same as in a theft case." Further, §2F1.1 refers "valuation of loss" to the discussion in §2B1.1, which provides that "[w]here the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim." Following these instructions, we find the sentencing court did not clearly err in finding the contract value was the amount of loss. Having found the loss to be between $120,000 and $200,000, the sentencing court properly increased Cannon's offense level by seven points. *See* §2F1.1(b)(1)(H).

[14] The sentencing court did not clearly err in increasing Cannon's offense level by two points for more than minimal planning. Under §§2F1.1(b)(2)(A) and 1B1.1 Application Note 1(f), we find no clear error in increasing Cannon's offense level for "affirmative steps . . . taken to conceal the offense." Agent Phillips testified that Cannon told her he altered certification forms from other contracts to conceal the substitution of nonconforming titanium. Further, Note 1(f) states that more than minimal planning "is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune." The acts charged in Count I involve numerous contracts spanning a four-and-a-half year period. The law in this Circuit permits a sentencing court to

> consider evidence of the defendant's conduct relating to counts on which the defendant was indicted but acquitted at trial[.]
>
> . . . . . .
>
> Acquitted conduct may be considered by a sentencing court because a verdict of acquittal

> demonstrates a lack of proof sufficient to meet a beyond-a-reasonable-doubt standard--a standard of proof higher than that required for consideration of relevant conduct at sentencing.

United States v. Averi, 922 F.2d 765, 765-66 (11th Cir. 1991). Accordingly, the sentencing court could properly consider the conduct charged in Counts II-IV as well, so long as the government proved them by the greater weight of the evidence. *See United States v. Alston*, 895 F.2d 1362, 1372-73 (11th Cir. 1990). Following the guidelines, we find the sentencing court did not clearly err by increasing the offense level for "more than minimal planning."

[15] Cannon argues the sentencing court erred in increasing his offense level for "conscious or reckless risk of serious bodily injury." We disagree. Cannon ordered nonballistically tested titanium to make armor plating on H-53 helicopters. The USAF paid for titanium that *had* passed the ballistics test, not titanium that *might* pass the test. Further, Agent Phillips testified that Cannon told her "inferior bearings had been substituted on the [connecting link assemblies used to feather propellers on a C-130 aircraft] versus installing the bearing that were called out for in the government specifications . . . [and that] based on his 20 years experience in the aircraft industry, that the inferior bearings would crack under pressure." (R2-71). We find that the sentencing court did not clearly err when it found the government had proved "conscious or reckless risk of serious bodily injury" by the greater weight of the evidence.[3]

---

[3]It is most reasonable to consider the loss of life or serious bodily injury that can occur when essential parts of an aircraft fail. To argue that there is no evidence of a failure *yet* is to completely ignore the reason for the standards established in the contracts, to wit: the safety of all personnel using the aircraft.

Finally, Cannon argues that the sentencing court erroneously applied §3B1.1(c)--"aggravating role as an organizer, leader, manager, or supervisor." We disagree. The Introductory Commentary to §3B1.1

> provides adjustments to the offense level based upon the role the defendant played in committing the offense . . . [which is determined] on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct), *i.e.*, all conduct included under §1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction.

Based on this instruction and the laundry list of considerable factors listed in §3B1.1 Application Note 4, we find the sentencing court did not clearly err by increasing the offense level under this section.

D. Conclusions of Law

i. Count One: The Conspiracy Count

[16] The jury convicted Cannon under 18 U.S.C. §371 for "Conspiracy to commit offense or to defraud United States." The statute commands

> [i]f two ore more persons conspire either to commit an offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

The government identified Cannon's unindicted coconspirators as Space Age Manufacturing, Inc., and Space Age's President, Jack C. Kerstetter. Cannon placed bids, signed the contracts at issue, and knowingly purchased nonconforming titanium. Cannon and

Kerstetter discussed that ordering conforming titanium would cause Space Age to lose money. While Cannon argues that he purchased the titanium because Kerstetter "ordered" him to do it, this does not absolve his actions. Cannon, Space Age & Kerstetter gave the USAF titanium with less pecuniary value than the titanium it contracted for, and with less performance value than the titanium it contracted for.

Viewing the evidence in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), including all reasonable inferences and credibility judgments, we find that a reasonable trier of fact, when choosing among reasonable constructions of the evidence, could have found the defendant guilty beyond a reasonable doubt. *United States v. Kelly*, 888 F.2d 732, 740 (11th Cir. 1989). We affirm Cannon's conviction on Count I.

ii. Count Five: The Substantive Count

[17] Cannon argues the evidence cannot support a conviction on Count V pursuant to 18 U.S.C. §1001. We agree.

The government had to prove Cannon knowingly and willfully falsified, concealed or covered up by trick, scheme, or device a material fact, or made false, fictitious or fraudulent statements or representations, or made or used any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry. *See* 18 U.S.C. §1001.

The government charged in the indictment that Cannon violated §1001 because he "used and caused to be used a Form DD 250[.]" Despite the jury verdict, as a matter of law, the government failed to prove the DD 250 forms were false. The government argues that "when [the contractor] submits the document [DD 250, he] is telling the government that he has manufactured the items according to the government specifications, and that he is ready to delivery them so that he can

be paid." Appellee's Br. at 25. Nowhere on the DD 250 does Cannon or anyone at Space Age certify that the parts supplied conform to the contract. Rather, the government QAR signs the form signifying acceptance and conformance of the goods.

The government argues Cannon caused the QAR to make a false statement by presenting the DD 250 forms, representing to him that the contracts had been performed to specifications, and having the QAR sign the DD 250, accepting the items and certifying that they met the contract specifications. *See id.* at 25-26. We disagree.

The government's only shred of evidence to show the QAR signed the DD 250 forms because of false representations was the QAR's testimony that he would not have signed the DD 250 unless he'd been presented with a document certifying the titanium as ballistically tested. Agent Phillips, however, testified that when the government seized the file for the contract charged in Count V, the only certification form it contained showed no signs of tampering and was for nonballistically tested titanium (R3-61-62). Although the titanium did not conform, the documents did not lie. It was through the failure of the QAR to perform an adequate review that the nonconforming material was certified.

Viewing the evidence in the light most favorable to the government, *see Glasser*, 315 U.S. 60, 62 S.Ct. 457, including all reasonable inferences and credibility judgments, we hold that no reasonable trier of fact, when choosing among reasonable constructions of this evidence, could have found the defendant guilty beyond a reasonable doubt of *using false documents or representations to defraud the government*. *See Kelly*, 888 F.2d at 740. The district court reversibly erred when it denied Cannon's motion for judgment of acquittal on Count V.

E. Miscellaneous

i. Prosecutorial Misconduct

[18] The transcript of the government's closing argument shows no prosecutorial remarks that either (1) were improper or (2) prejudiced Cannon's substantive rights. (R6-157-65); *see United States v. Cole*, 755 F.2d 748, 676 (11th Cir. 1985). The Assistant United States Attorney, Ms. Duke, contrary to Cannon's argument on appeal, did not argue that the titanium supplied by Space Age "would not work or perform under fire." Appellant's Br. at 13. Rather, she argued that the titanium "may indeed pass a ballistic tests [sic], but the only way you're going to know that is if you get shot at." (R6-156). Ms. Duke's statement is correct. After-the-fact testing cannot cure the initial failure to supply tested titanium. Indeed, we stress that the record shows the only ballistics testing on this titanium was done *by the government in connection with this prosecution*. Moreover, as discussed in III.B., the titanium that passed the tests has not been proved to be related to the batch used in performing the contracts. At this point, the Air Force can only hope such is the case.[4]

Accordingly, we find the remarks were proper, and when reviewed in context, assessing the probable jury impact, we find no prejudice to Mr. Cannon's substantive rights. *See Stefan*, 784 F.2d 1093, 1100 (11th Cir. 1986). The district court properly denied Cannon'[[s motion for a mistrial. Finding no merit to any of Cannon's prosecutorial misconduct allegations, we deny his request for a new trial.

ii. Indictment Sufficiency

Based on our findings in III.D.ii. that the DD 250 forms

---

[4]By now, most of the ball bearings in the link assemblies may have been tested.

cannot support a conviction under 18 U.S.C. §1001, and resulting reversal of Count V, we need not discuss whether the indictment sufficiently charged aiding and abetting in that count.

IV. CONCLUSION

We hold that the district court (1) did not abuse its discretion in ruling on evidence; (2) did not clearly err in its fact findings; (3) properly denied Cannon's motion for a mistrial; (4) properly denied Cannon's motion for a judgment of acquittal on County I; and (5) reversibly erred, as a matter of law, when it denied cannon's motion for a judgment of acquittal on Count V. We REVERSE and REMAND with instructions to enter a not guilty judgment as a matter of law on Count V. The judgment of the district court as to Count I is affirmed.

AFFIRMED in part; REVERSED in part.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-8498

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
[MAR 29 1995]
MIGUEL J. CORTEZ
CLERK

UNITED STATE OF AMERICA,

Plaintiff-Appellee,

versus

JODY CANNON,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Georgia

---

ON PETITION(S) FOR REHEARING AND SUGGESTIONS(S) OF REHEARING EN BANC

Before: COX, Circuit Judge, and FAY, Senior Circuit Judge, and NELSON*, District Judge.

Appendix B

PER CURIAM:

(XX) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted n favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

[Signed by Judge Cox]
UNITED STATES CIRCUIT JUDGE

*Honorable Edwin L. Nelson, U.S. District Judge for the Northern District of Alabama, sitting by designation.

UNITED STATES DISTRICT COURT
Middle District of Georgia
Macon Division

Filed 2:06 p.m.
APR -5 1993
[signed by Nora Paul]
Deputy Clerk U.S. District Court
Middle District of Georgia

UNITED STATE OF AMERICA

v. Case Number CR 92-41-MAC-DF

Jody Cannon
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, Jody Cannon, was represented by Mitchel House, Macon, Georgia.

The defendant was found guilty on count(s) 1 and 5 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:371 i/c/w/ 1001	Conspiracy to falsify Dept. of Air Force Documents	3/12/91	1
	Falsify Dept. of Defense Documents	4/18/90	5

As pronounced on 3/24/93, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for count(s) 1 and 5, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

The defendant has been found not guilty on count(s) 2, 3 and 4 and is discharged as to such count(s).

Signed this the 5 day of April, 1993.

[signed by Judge Fitzpatrick]
Duross Fitzpatrick
United States District Judge

Defendant's SSAN: 221-32-2656
Defendant's Date of Birth: 10/25/54
Defendant's address:
295 Fairgrounds Road, Warner Robins, GA 31093

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 30 months on each of Cts. 1 and 5 to run concurrently for 30 months.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons as directed by the U.S. Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
United States Marshal

By: _____
Deputy Marshall

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

3. The defendant shall not own or possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit

a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic and other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties or risks that may be occasioned by the defendant's criminal record or personal history or

characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

It is the Court's judgment that the defendant is unable and not likely to become able to pay all or part of a fine even with the use of a reasonable installment schedule; therefore, the Court waives the fine as well as any alternative sanctions in this case. The Court is also waiving the additional fine requiring that defendant pay the cost of imprisonment and/or supervision fee.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report except the Court ruled that the amount of loss was $125,257 which would yield an increase of 7 levels pursuant to USSG 2F1.1(b)(H).

Guideline Range Determined by the Court:

Total Offense Level:	19
Criminal History Category:	1
Imprisonment Range:	30 months to 37 months
Supervised Release Range:	2 to 3 years
Fine Range:	$ 6,000 to $ 60,000
Restitution:	$ 0 (waived due to inability to pay)

The fine is waived or is below the guideline range because of the defendant's inability to pay.

Restitution is not ordered due to defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

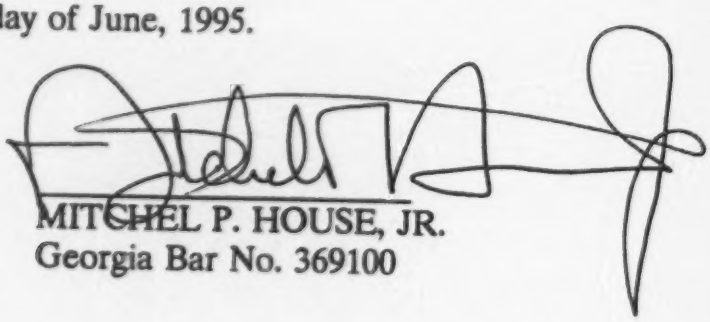
CERTIFICATE OF SERVICE

This is to certify that I have this day served three true and correct copies of the foregoing document upon the following party by depositing same in the United States Mail, postage prepaid and properly addressed to insure delivery to:

Solicitor General
Department of Justice
Washington, D.C. 20530

Miriam Duke
Sharon T. Ratley
United States Attorney's Office
P. O. Box U
Macon, Georgia 31202-U

This 23rd day of June, 1995.



MITCHEL P. HOUSE, JR.
Georgia Bar No. 369100

OF COUNSEL:

SELL & MELTON
1400 Charter Medical Building
P. O. Box 229
Macon, Georgia 31297-2899
(912) 746-8521